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No. 95-1030

IN THE

Supreme Court of the United States

October Term, 1995

HUGHES HUBBARD & REED,

Petitioner,

v.

A.B. ROBBS, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: December 11, 1995

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42 pp

QUESTIONS PRESENTED

1. Whether for preclusion purposes a final judgment allowing a bankruptcy creditor's contested proof of claim is, as the two-to-one majority of the court of appeals below stated (emphasis added), "not tantamount to the award of a money judgment in an ordinary civil proceeding."

2. Whether a bankruptcy debtor can avoid the preclusive effect of a final judgment allowing a creditor's contested proof of claim by later voluntarily dismissing his overall chapter 11 reorganization proceeding.

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Petitioner Hughes Hubbard & Reed ("HH&R") respectfully prays that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 12, 1995.

OPINIONS AND JUDGMENTS BELOW

The court of appeals' opinion is set out in Appendix A hereto.[1] The district court's Findings Of Fact, Conclusions Of Law And Judgment (the "Judgment") is set out in Appendix B hereto, and its order denying the motion of debtor/respondent A.B. Robbs, Jr. ("Robbs") for reconsideration is set out in Appendix C hereto.

JURISDICTION

The court of appeals' decision denying HH&R's timely petition for rehearing but withdrawing and amending the court's original decision filed on November 1, 1994, was filed on September 12, 1995. This Court has jurisdiction to review the court of appeals' decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 349(b)

> "Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
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> . . . .

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[1] That the opinion is unpublished does not affect the Court's decision whether to review the case. Commissioner v. McCoy, 484 U.S. 3, 7 (1987) ("carries no weight").

"(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

"(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

11 U.S.C. § 502

"(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

"(b) . . . if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount . . . ."

28 U.S.C. § 157

"(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . ., and may enter appropriate orders and judgments, subject to review under section 158 of this title.

"(2) Core proceedings include, but are not limited to--

. . . .

"(B) allowance or disallowance of claims against the estate . . .;

"(C) counterclaims by the estate against persons filing claims against the estate;

. . . .

"(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. . . ."

STATEMENT OF THE CASE

On April 2, 1991, Robbs filed a petition for relief under chapter 11 of the Bankruptcy Code following return of a multi-million-dollar verdict against him in a civil, breach-of-fiduciary-duty case in which HH&R was his trial counsel.[2] At the request of Robbs and his bankruptcy counsel (not HH&R, which had never represented Robbs in the bankruptcy case and had been replaced as his counsel in the civil case), the reference to a bankruptcy judge was withdrawn and the bankruptcy case was assigned to the district judge who had presided over the civil action in which the verdict adverse to Robbs had been returned.

On January 6, 1992, HH&R filed a proof of claim for unpaid pre-petition legal services that HH&R had rendered to Robbs.[3] On March 17, 1992, Robbs commenced a separate action in state court alleging malpractice claims against HH&R arising out of the same transactions and occurrences

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2 HH&R was substituted in for the firm that had handled the case from inception through the close of discovery.

3 In August 1991, Robbs' bankruptcy counsel informed HH&R that there would be a hearing in October 1991 on various professionals' fee applications and that HH&R should apply for its post-petition fees by September 26. After receiving a draft of HH&R's fee application, Robbs' bankruptcy counsel informed HH&R that Robbs was asking all professionals (including HH&R) to postpone their fee applications so that counsel could concentrate on other matters in the chapter 11 case. On December 24, 1991, HH&R learned that Robbs had applied for dismissal of his bankruptcy case and intended to ask the district court to leave HH&R's fee application unresolved. HH&R promptly applied for an order shortening time so that its fee application could be resolved before the district court considered dismissal. After the district court ruled that it would hear HH&R's fee application, Robbs stipulated to the granting of that application.

as did HH&R's January 6 proof of claim.[4] On July 17, 1992, HH&R filed a motion in the bankruptcy case for allowance of its claim. [5] Instead of simply relying on the evidentiary presumption created by Bankruptcy Rule 3001(f) in favor of a proof of claim, HH&R submitted declarations showing what legal work was done and debunking the malpractice allegations that Robbs made in his state-court complaint, thus treating them as objections to HH&R's proof of claim even though no formal objections had been filed. Robbs filed his opposition to HH&R's motion, and on September 9, 1992, the district court heard argument and took the matter under submission. At the same time, the district court declined Robbs' request that it dismiss the bankruptcy case without resolving HH&R's motion. On September 11, 1992, in accordance with 11 U.S.C. § 502(b), the district court filed the Judgment allowing HH&R's proof of claim in full and

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[4] These claims were compulsory counterclaims under Bankruptcy Rule 7013 and Fed. R. Civ. P. 13(a) and could be asserted, if at all, only in Robbs' bankruptcy proceeding. E.g., In re Direct Satellite Communications, Inc., 91 B.R. 7, 8 (Bankr. E.D. Pa. 1988) (malpractice claims against former counsel who filed proof of claim are compulsory counterclaims and "core proceedings" under 28 U.S.C. § 157(b)(2)(C)). See generally Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974) ("A counterclaim which is compulsory but is not brought is thereafter barred . . . .").

[5] Since Robbs asserted no counterclaim, HH&R's proof of claim was subject to Bankruptcy Rule 9014 governing "contested matters" (rather than Bankruptcy Rules 7001 et seq. governing "adversary proceedings"). See Bankruptcy Rule 3007 and the Advisory Committee Note thereto ("The contested matter initiated by an objection to a claim is governed by Rule 9014, unless a counterclaim by the trustee is joined with the objection to the claim. The filing of a counterclaim ordinarily commences an adversary proceeding subject to the rules in Part VII."). Under Bankruptcy Rule 9014, "contested matters" are resolved by motion.

rejecting Robbs' allegations of malpractice. Thereafter on September 11, 1992, the district court dismissed Robbs' chapter 11 case at Robbs' request.

Robbs subsequently moved for reconsideration of the Judgment. The district court denied his motion and issued a written order to that effect on December 7, 1992. The written order found Robbs' malpractice assertions to be "preposterous" and HH&R's representation of Robbs to have been "exemplary on behalf of a difficult client in a difficult legal predicament." On December 17, 1992, Robbs filed his notice of appeal.

On March 5, 1993, the state court granted HH&R's motion for summary judgment based on principles of res judicata and collateral estoppel and stayed further proceedings pending resolution of Robbs' federal appeal. See Levy v. Cohen, 19 Cal. 3d 165, 172-74, 137 Cal. Rptr. 162, 561 P.2d 252, cert. denied, 434 U.S. 833 (1977).

On November 1, 1994, the Ninth Circuit Court of Appeals dismissed Robbs' appeal on mootness grounds and expressed the advisory opinion that under the Bankruptcy Code the Judgment would not be entitled to preclusive effect in other litigation between the parties. On November 15, 1994, HH&R timely petitioned for rehearing. On September 12, 1995, the court of appeals withdrew its November 1 opinion and, by a 2-to-1 decision (Judge Kleinfeld dissenting), entered a new opinion, which restated the court's holdings that Robbs' dismissal of his chapter 11 case mooted his appeal from the Judgment allowing HH&R's proof of claim and that allowance of HH&R's proof of claim was "not tantamount to the award of a money judgment in an ordinary civil proceeding" (citing the court's prior decision in In re Nash, 765 F.2d 1410, 1412-13 (9th Cir. 1985)) and added a new final paragraph that expressly vacated "the district court's order [i.e., the Judgment] to prevent the order from

having any legal effect on the parties to this action." Judge Kleinfeld dissented on the grounds that the preclusive effect of a judgment is not for the court issuing or reviewing the judgment to decide,[6] that Robbs' appeal was not moot and that, even if it were, it would have been because of Robbs' voluntary dismissal of his bankruptcy case, which would not entitle Robbs to relief from the Judgment against him. Judge Kleinfeld indicated that he would have held that allowing Robbs to relitigate the issues before another judge is a waste of HH&R's and the district court's work on the case, which the court of appeals should not permit.

DISTRICT COURT JURISDICTION

The district court below had jurisdiction under 11 U.S.C. §§ 301 and 502(b) and 28 U.S.C. §§ 157(b) and (d) and 1334.

REASONS FOR GRANTING THE WRIT

As explained below, the Ninth Circuit's decision denying that a final judgment in bankruptcy allowing a creditor's proof of claim is the preclusive equivalent of an ordinary civil money judgment and giving a debtor power to avoid an adverse judgment on a proof of claim, and to litigate anew in another court, by the simple expedient of dismissing his overall bankruptcy case directly conflicts with recent decisions of the Second and Fifth Circuits and misinterprets

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6 See, e.g., Pettibone Corp. v. Easley, 935 F.2d 120, 123-24 (7th Cir. 1991) ("Disputes about the effect of a decision in one case on the prosecution of another are for the judge presiding in the second case. In the law of preclusion, the second court normally determines the effects of the first judge's order. [Citations omitted.] Section 1142(b) [of the Bankruptcy Code] does not permit the bankruptcy judge to instruct the judge hearing the tort case . . . .").

or misapplies three core bankruptcy statutes (11 U.S.C. §§ 349 and 502 and 28 U.S.C. § 157). Few, if any, procedural principles are more important than finality of judgments and few erroneous rulings are more destructive of the efficient administration of justice than those that permit losing parties to relitigate claims that have been finally adjudicated. The decision of the Ninth Circuit in this case strikes at the heart of federal procedure and should be reviewed and reversed.

I.

THE NINTH CIRCUIT'S DECISION THAT A FINAL JUDGMENT IN BANKRUPTCY ALLOWING A CREDITOR'S PROOF OF CLAIM IS "NOT TANTAMOUNT" FOR PRECLUSION PURPOSES TO AN ORDINARY CIVIL MONEY JUDGMENT UNDERCUTS CORE FEDERAL BANKRUPTCY AND FINALITY PRINCIPLES AND DIRECTLY CONFLICTS WITH A 1995 DECISION OF THE SECOND CIRCUIT AND A 1993 DECISION OF THE FIFTH CIRCUIT

The Ninth Circuit's opinion that "[t]he allowance of a claim in bankruptcy is not tantamount to the award of a money judgment in an ordinary civil proceeding" directly conflicts with the Second Circuit's recent decision in In re Porges, 44 F.3d 159, 164 (2d Cir. 1995), and the Fifth Circuit's recent decision in In re Baudoin, 981 F.2d 736, 742 & n.14 (5th Cir. 1993).

In Porges,[7] following a bench trial in an adversary proceeding on a creditor's proof of claim and a chapter 13

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7 HH&R invited the Ninth Circuit's attention to Porges by way of a reply brief in support of its petition for rehearing, but the Ninth Circuit disregarded the Second Circuit's decision without comment.

debtor's counterclaims, the bankruptcy court orally ruled in favor of the creditor and directed the creditor's counsel to submit proposed findings and conclusions consistent with the court's rulings. One day before the findings and conclusions were due, the debtor dismissed his bankruptcy case. The bankruptcy court signed the dismissal order[8] but specifically retained jurisdiction to enter findings and conclusions in the adversary proceeding (which the court did later the same day) and a judgment (which it did a few months later pursuant to Bankruptcy Rule 9021 and Fed. R. Civ. P. 58). The debtor appealed on the ground that his dismissal of his bankruptcy case deprived the bankruptcy court of jurisdiction to enter a money judgment against him.

The Second Circuit held that 11 U.S.C. § 502, which directs bankruptcy courts to resolve proofs of claim, also authorizes entry of money judgments under Bankruptcy Rule 9021 and Fed. R. Civ. P. 58. 44 F.3d at 164. See Reid v. White Motor Corp., 886 F.2d 1462, 1468 (6th Cir. 1989) (entry of judgment denying proof of claim), cert. denied, 494 U.S. 1080 (1990). The Second Circuit noted that "the exercise of a court's equitable powers to enter judgment is particularly appropriate where the court's decision would have preclusive effect in any subsequent proceedings." 44 F.3d at 165.

The Second Circuit relied in part on Baudoin, supra, where the Fifth Circuit held that orders allowing a bank's proof of claim and directing and confirming a sale of the debtors' property precluded their subsequent assertion of a

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8 A chapter 13 debtor has the absolute right to dismiss his bankruptcy case; a chapter 11 debtor (e.g., Robbs) does not. Compare 11 U.S.C. § 1307(b) (dismissal as of right) with 11 U.S.C. § 305 (dismissal only upon court order).

lender-liability claim against the bank in state court that under 28 U.S.C. § 157(b)(2)(C) and Bankruptcy Rule 7013 (incorporating Fed. R. Civ. P. 13(a)) they could and should have asserted as a compulsory counterclaim in their bankruptcy case. As the Fifth Circuit held in Baudoin, "an order allowing a proof of claim is . . . a final judgment" on the merits for res judicata purposes. 981 F.2d at 742. Accord, In re W.J. Services, Inc., 139 B.R. 824, 827-28 (Bankr. S.D. Tex. 1992) (allowance of former counsel's fee application precludes debtor from filing malpractice action in state court). See generally Katchen v. Landy, 382 U.S. 323, 334 (1966) ("The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts. [Citation omitted.] More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined [citations omitted]; and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim."). See also In re Morse Electric Co., 805 F.2d 262, 264 (7th Cir. 1986) ("A disposition of a creditor's claim in a bankruptcy is 'final' for purposes of [28 U.S.C.] § 158(d) [authorizing appeals] when the claim has been accepted and valued, even though the court has not yet established how much of the claim can be paid given other, unresolved claims."); In re Saco Local Development Corp., 711 F.2d 441, 443-46 (1st Cir. 1983) (per Judge, now Justice, Breyer) (every creditor's claim within an overall bankruptcy case, not the overall case itself, is the relevant "judicial unit" for purposes of assessing finality and appealability).

II.

THE NINTH CIRCUIT'S DECISION THAT A DEBTOR CAN AVOID THE PRECLUSIVE EFFECT OF A JUDGMENT ALLOWING A CREDITOR'S PROOF OF CLAIM BY VOLUNTARILY DISMISSING HIS OVERALL BANKRUPTCY CASE MISCONSTRUES 11 U.S.C. § 349(b) AND DIRECTLY CONFLICTS WITH A 1995 DECISION OF THE SECOND CIRCUIT

In holding that a debtor's voluntary dismissal of his overall bankruptcy case destroys the preclusive effect of a prior judgment allowing a creditor's proof of claim, the decision below directly conflicts again with the Second Circuit's decision in In re Porges, 44 F.3d 159 (2d Cir. 1995). As the court there held,

> "While Porges obtained a dismissal of his bankruptcy case and chose not to convert his petition to a proceeding under another chapter of the Bankruptcy Code, he previously had sought bankruptcy protection and initiated the adversary proceeding. Porges thus subjected himself "'to all the consequences that attach to an appearance,"' including the determination of liability on Gruntal's claims. *In re McLaren*, 3 F.3d at 966 (quoting *Hillman*, 296 U.S. at 242, 56 S.Ct. at 211). A party seeking relief in bankruptcy court cannot avoid an adverse judgment by subsequently abjuring bankruptcy protection. *See Pepper*, 308 U.S. at 305, 60 S.Ct. at 244 (holding that where a court possesses jurisdiction over a disputed matter, it may exercise its equitable powers to ensure 'that substance will not give way to form, [and] that technical considerations will

> not prevent substantial justice from being done')."

44 F.3d at 165 (footnotes omitted). Accord, Florida Peach Corp. v. Commissioner, 90 T.C. 678, 684 (1988) (judgment allowing creditor's claim is not affected by subsequent dismissal of bankruptcy proceeding).

The Ninth Circuit created this conflict with the Second Circuit in part by misconstruing 11 U.S.C. § 349(b), which determines the effect, if any, of the district court's order granting Robbs' request for dismissal of his overall chapter 11 case on the court's prior Judgment allowing HH&R's proof of claim. Section 349(b) provides in pertinent part as follows:

> "Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
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> . . . .
>
> "(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> "(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

Section 349(b)(2) governs what effect dismissal of a bankruptcy case has on prior orders or judgments and vacates only those prior orders or judgments entered under the four sections enumerated therein (§§ 522(i)(l), 542, 550 and

553).[9] The Ninth Circuit's expanded reading of the statute directly conflicts with the Tax Court's decision in Florida Peach Corp. v. Commissioner, 90 T.C. 678, 683-84 (1988) ("the impact of section 349(b)(2) of the Bankruptcy Code is limited by the language enumerating the sections to which section 349(b) applies"); with a series of decisions of bankruptcy courts, In re Mulberry Chesterton Inn, L.P., 142 B.R. 566, 567-68 (Bankr. S.D. Ga. 1992), In re Depew, 115 B.R. 965, 970-72 (Bankr. N.D. Ind. 1989) ("The proper reading of § 349(b) is to restrict its operation to the sections of the Bankruptcy Code which it specifically refers to."), In re Searles, 70 B.R. 266, 270 (D.R.I. 1987), In re BSL Operating Corp., 57 B.R. 945, 952 (Bankr. S.D.N.Y. 1986); and with other authorities, Bushue Corp. v. First National Bank, 632 N.E.2d 1144, 1148 (Ill. App. 1994) ("it is only when a previous order is entered pursuant to one of the sections listed in section 349(b) that it is vacated by the voluntary dismissal of a bankruptcy proceeding"), 2 Collier on Bankruptcy ¶ 349.03, at 349-11 to 349-12 (15th ed. 1991) (footnote omitted) ("courts have refused to extend the reinstatement effect of section 349(b) beyond its expressly enumerated provisions").

In contrast to § 349(b)(2), which expressly covers pre-dismissal judgments and orders, § 349(b)(3), which

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9 The four enumerated provisions do not appear randomly in § 349(b)(2); all confer special avoidance powers on the debtor that would not exist outside of bankruptcy, i.e., rights to recover preferential transfers made to creditors within 90 days of bankruptcy, rights to require turnover of property held by a custodian and rights to avoid setoffs effected by creditors within 90 days of bankruptcy. See In re Depew, 115 B.R. 965, 971-72 (Bankr. N.D. Ind. 1989). For obvious reasons, it would not do to construe § 349(b) to authorize a debtor to recover a preferential payment that in fact had been owed under non-bankruptcy law and then to dismiss his bankruptcy case and retain the money.

revests property in the entity that held it before bankruptcy, does not affect pre-dismissal judgments and orders at all.[10] In re Mulberry Chesterton Inn, L.P., 142 B.R. 566, 568 (Bankr. S.D. Ga. 1992) (footnote omitted):

> "[D]espite general language in legislative history and some cases regarding the intent of subsection (c) [actually, subsection (b)(3)] which 'revests' property of the estate I have been cited no controlling authority which holds that such revesting retroactively annuls intervening rights which may have vested or final rulings that have been rendered.
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> "In the absence of such authority the better rule is one which applies prospectively only, except to the extent that Congress has decreed otherwise, expressly, by statute. To do otherwise would lead to great uncertainty and potential mischief.
>
> ". . . It would permit unsuccessful parties to litigate the same issues a second time. It would encourage debtors who unsuccessfully litigate in this Court to dismiss and try again elsewhere, and creditors would be given added incentive, unrelated to the appropriateness of a debtor seeking relief in this Court, to force a dismissal after an

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10 Otherwise, § 349(b)(2) would be read out of the statute, thus violating the principle that statutes be interpreted to give effect to all of their different parts. See, e.g., In re Barton Indus., Inc., 159 B.R. 954, 960 & n.11 (Bankr. W.D. Okla. 1993) (applying this principle to § 349(b)(2)); In re Depew, 115 B.R. 965, 969 (Bankr. N.D. Ind. 1989) (same).

> adverse ruling. Such a fundamental attack on the finality of Bankruptcy Court judgments surely was not intended by Congress."

Entry of the Judgment in favor of HH&R did not change the ownership or "vesting" of property at all, any more than entry of an ordinary civil money judgment would do. Instead, it resolved a claim, and made the findings of fact and drew the conclusions of law necessary to that resolution. Had Robbs not dismissed his chapter 11 case, the automatic stay would have precluded HH&R from executing on the Judgment,[11] but in all other ways the Judgment was and is no different from an ordinary money judgment entered outside of bankruptcy.

Finally, § 349(b) expressly authorizes the court exercising bankruptcy jurisdiction to restrict the effect of dismissal of a bankruptcy case. E.g., United States v. Standard State Bank, 905 F.2d 185, 187 (8th Cir. 1990) (construing order dismissing chapter 11 case as implicitly precluding reinstatement of tax lien surrendered as part of confirmed plan of reorganization). Here, the district court decided to resolve HH&R's proof of claim before considering Robbs' request for dismissal because it had presided over the action in which HH&R's claim and Robbs' objections thereto had arisen and therefore as a matter of judicial economy was in the best position to resolve those matters.

A court can retain its bankruptcy jurisdiction to resolve a contested matter between a debtor and a creditor notwithstanding the dismissal of the overall bankruptcy case. E.g., In re Morris, 950 F.2d 1531, 1533-35 (11th Cir. 1992);

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[11] Only in this sense, at most, is the Judgment not "a money judgment for the amount of [HH&R's] fees" as the court of appeals observed.

In re Pocklington, 21 B.R. 199, 202 (Bankr. S.D. Cal. 1982) (considerations of judicial economy resulting from bankruptcy court's familiarity with evidence and prior proceedings warrant resolution of creditor claim despite dismissal of overall bankruptcy proceeding).[12] If, as the court of appeals held, whatever order or judgment resulted from these reserved post-dismissal proceedings would have no binding effect, obviously there would be no reason for Congress to have authorized a court to enter them. A fortiori, the district court had authority to refuse to dismiss Robbs' chapter 11 case before it decided HH&R's proof of claim.

Apart from misconstruing 11 U.S.C. § 349(b), the court of appeals also relied on its own prior decision in In re Nash, 765 F.2d 1410 (9th Cir. 1985), which held that the pre-1984 version of the Bankruptcy Code required the court to hold that the voluntary dismissal by a debtor in a chapter 13 "wage-earner" case and his immediate filing of a new chapter 13 case precluded the original chapter 13 trustee from distributing to a creditor $957.73 in undistributed post-petition wage-deduction contributions made to the trustee by the debtor's employer pursuant to the terms of a confirmed chapter 13 plan.[13] But, as indicated above, chapter 13 cases are unique because, by statute, only there do debtors have a

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12 The decision to exercise jurisdiction is discretionary and subject to review only for abuse. In re Morris, 950 F.2d at 1535-36. Courts have routinely retained jurisdiction post-dismissal to resolve issues relating to attorneys' fees. E.g., In re Fox, 140 B.R. 761, 762 (Bankr. D.S.D. 1992); In re Fricker, 131 B.R. 932, 937-38 (Bankr. E.D. Pa. 1991).

13 In 1984, Congress added current subsection (a) to 11 U.S.C. § 1326, thus expressly directing chapter 13 trustees to distribute retained funds in accordance with confirmed plans. See In re Halpenny, 125 B.R. 814, 815 (Bankr. D. Haw. 1991); In re Lennon, 65 B.R. 130, 136-37 (Bankr. N.D. Ga. 1986).

continuing absolute right to dismiss their cases.[14] See United States v. Standard State Bank, 91 B.R. 874, 878 (W.D. Mo. 1988), aff'd, 905 F.2d 185 (8th Cir. 1990):

> "The Bank contends that Nash is not applicable because Chapter 13, unlike Chapter 11, allows debtors a continuing option to dismiss their cases. Holding a debtor bound by a confirmed plan (as provided by 11 U.S.C. § 1327(a)) would thus be inconsistent with the escape hatch of dismissal, provided in 11 U.S.C. § 1307(b). . . . [T]his distinction appears to be sound, and is consistent with the reasoning of the Nash court (765 F.2d at 1413) . . . ."

The issue in Nash was not whether the allowance of a creditor's claim pursuant to a stipulated and confirmed chapter 13 plan precluded relitigation of the claim but whether the chapter 13 trustee could distribute payments received on the debtor's behalf pursuant to the plan notwithstanding the debtor's exercise of his statutory right to dismiss his chapter 13 case (and thereby abandon his right to a discharge). Had the debtor not commenced a second chapter 13 case (thus giving rise to an automatic stay), the creditor presumably could simply have executed on its allowed claim.

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14 The reason for providing an unrestricted dismissal option to a chapter 13 debtor may have been to avoid forcing an individual to work for the estate against his will and thus potentially to violate the thirteenth amendment prohibition against involuntary servitude. See generally In re Lennon, 65 B.R. 130, 131-32 (Bankr. N.D. Ga. 1986) (1978 Bankruptcy Code designed to make chapter 13 attractive alternative to liquidation in order to encourage debtors to use their otherwise-exempt post-petition earnings to pay creditor claims).

Permitting a chapter 13 debtor to discontinue making his post-petition earnings available to a chapter 13 trustee under a confirmed plan is a far cry from permitting a chapter 11 debtor to avoid the consequences of a final judgment in a contested matter simply by dismissing his overall reorganization proceeding.[15] See generally In re Shaffer, 48 B.R. 952, 957 (Bankr. N.D. Ohio 1985) (despite subsequent conversion to chapter 7, order avoiding creditor's lien after formal proceedings would bar relitigation but order confirming chapter 13 plan would not). The district court here obviously intended the Judgment to survive the dismissal of Robbs' bankruptcy case, exactly as 11 U.S.C. § 349(b) generally authorized and 11 U.S.C. § 349(b)(2) specifically mandated. The contrary result reached by the court of appeals misconstrues the statute, conflicts with prior decisions and warrants this Court's review and reversal.

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15 As the dissenting judge below observed, by voluntarily dismissing his chapter 11 case, Robbs could not manufacture mootness as an impediment to appeal on the merits and in that manner successfully avoid the preclusive effect of the Judgment, citing Anderson v. Green, 513 U.S. ___, 115 S. Ct. 1059, 130 L. Ed. 2d 1050 (1995). See generally U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. ___, 115 S. Ct. 386, 130 L. Ed. 2d 233, 242-44 (1994) (vacatur of judgment ordinarily is improper where appeal becomes moot by virtue of appellant's voluntary election to settle).

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

December 11, 1995

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 12 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re ALFRED BERT ROBBS, JR., Debtor.	
ALFRED BERT ROBBS, JR., an individual, Appellant, v. HUGHES, HUBBARD & REED; WILLIAM T. BISSET; RITA M. HAEUSLER, Appellees.	No. 93-55099 D.C. No. CV-91-01869-JDS ORDER

Before: BROWNING, FERGUSON and KLEINFELD, Circuit Judges

The memorandum disposition filed November 1, 1994, is withdrawn.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 12 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re ALFRED BERT ROBBS, JR., Debtor.	
ALFRED BERT ROBBS, JR., an individual, Appellant, v. HUGHES, HUBBARD & REED; WILLIAM T. BISSET; RITA M. HAEUSLER, Appellees.	No. 93-55099 D.C. No. CV-91-01869-JDS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted February 2, 1994
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: BROWNING, FERGUSON and KLEINFELD, Circuit Judges

The dismissal of the underlying bankruptcy case rendered this appeal moot. See Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78 (1990).

The order from which appeal was taken allowed HHR's claim for attorneys' fees over Robbs's challenge thereto based upon allegations of malpractice. (See E.R. 12, 30, 110, 112.5, 307.) The order did not award HHR a money judgment for the amount of its fees or determine Robbs's claims of malpractice, which were then pending in a separate proceeding in the district court.[1] (See Robbs Brief 4; HHR Brief 4.)

The allowance of a claim in bankruptcy is not tantamount to the award of a money judgment in an ordinary civil proceeding. Cf. Nash v. Kester (In re Nash), 765 F.2d 1410, 1412-13 (9th Cir. 1985) (creditor whose claim had been confirmed in Chapter 13 plan had no right to further payment under plan after bankruptcy case was dismissed). The primary consequence of allowance of a claim is that the successful claimant may participate in a distribution under the plan, an event foreclosed by the district court's dismissal of the bankruptcy case under 11 U.S.C. § 305. See id.; 11 U.S.C.A. §§ 305, 1141 (West 1993); Fed. Bankr. R. 3021 (after confirmation of a plan, distribution made to creditors whose claims have been allowed). Dismissal of Robbs's bankruptcy case, (see S.E.R. 74-81), the only case over which the district judge had jurisdiction, rendered moot all issues relating to the debtor's reorganization and operated to restore the interests of Robbs and his creditors to the status quo ante, insofar as practicable. See 11 U.S.C.A. § 349 & historical note (West 1993); Nash, 765 F.2d at 1412-13 (dismissal of Chapter 13 plan effectively vacated the plan). The district court's order allowing HHR's claim is not entitled to preclusive effect, see Nash, 765

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1 Instead, the court considered the issue of malpractice, briefed summarily by the parties, only insofar as was necessary to determine the "reasonable value of [HHR's legal] services" under 11 U.S.C. § 502(b)(4). See 11 U.S.C.A. § 502(b)(4) (West 1993).

F.2d at 1412-13; therefore, our resolution of the merits of the appeal could not affect the rights of the litigants in this case. See Lewis, 494 U.S. at 477.

Because the issues raised in HHR's motion for allowance of its pre-petition claim have become moot as a result of the dismissal of the underlying bankruptcy action, we must vacate the district court's order to prevent the order from having any legal effect on the parties to this action. See Western Farm Credit Bank v. Davenport (In re Davenport), 40 F.3d 298, 299 (9th Cir. 1994). Accordingly, the district court's September 11, 1992 order entitled "Findings of Fact, Conclusions of Law and Judgment" is

VACATED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 12 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re ALFRED BERT ROBBS, JR., Debtor.	)	
ALFRED BERT ROBBS, JR., an individual, Appellant, v. HUGHES, HUBBARD & REED; WILLIAM T. BISSET; RITA M. HAEUSLER, Appellees.	)	No. 93-55099 D.C. No. CV-91-01869-JDS ORDER

Before: BROWNING, FERGUSON and KLEINFELD, Circuit Judges

The majority of the panel votes to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Robbs v. Hughes, No. 93-55099

Filed

FILED
SEP 12 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KLEINFELD, Circuit Judge, Dissenting.

I respectfully dissent from denial of rehearing, and the disposition as amended.

Hughes, Hubbard claimed about $142,000 for legal fees and expenses from the bankrupt, Robbs. Robbs claimed that Hughes, Hubbard failed to perform its services in a workmanlike manner, so he did not owe the money. When Robbs signed his declaration in December of 1991 in support of his motion to dismiss his bankruptcy case, he said that Hughes, Hubbard & Reed claimed fees from him, and he disputed the claim and had counterclaims against the law firm. The law firm subsequently filed its proof of claim January 6, and Robbs contested it and filed his counterclaim. Judge Shanstrom did not grant Robbs' motion to dismiss the bankruptcy until after he decided the claim for fees, implicitly rejecting the counterclaim for malpractice. The docket sheet shows that Judge Shanstrom had his decision on the lawyers' fees claim docketed as number 172, and his order granting the motion to dismiss as number 174. Thus Judge Shanstrom first decided that Hughes, Hubbard was right, Robbs wrong, and only then dismissed the bankruptcy. The state court then treated Judge Shanstrom's decision on the claim for legal fees and the malpractice claim as res judicata. By holding that the case was moot, and vacating Judge Shanstrom's decision on the claim, we allow Robbs to avoid the consequences of his loss on the merits before Judge Shanstrom, and to litigate the issue again before another judge. I do not think we need to allow this waste of Hughes, Hubbard's or Judge Shanstrom's work on this case.

We have held that "the determination of whether a case becomes moot on the dismissal of the bankruptcy hinges on the question of how closely the issue in the case is connected to the underlying bankruptcy." In re Universal Farming Industries, 873 F.2d 1334, 1335 (9th Cir. 1989). In Universal Farming, we held

that a question of priorities between creditors was ancillary, unlike a motion to reimpose an automatic stay. Id. We noted that dismissal of a bankruptcy petition does not moot an application for compensation for services in connection with the bankruptcy. Id. The question of whether Hughes Hubbard performed $142,000 worth of legal services for Robbs, or engaged in malpractice, seems to me to be similarly ancillary.

Because the case is not moot, we need not decide the res judicata issue. Under both federal law and California law, the preclusive effect of a judgment is ordinarily a matter for the second court, not this court as reviewing the first court, to decide. See Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522, 525 (7th Cir. 1985); Interinsurance Exch. of the Automobile Club of Southern Cal., 33 Cal. Rptr. 533, 537 (Cal. App. 1963).

We need not decide whether United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950), and Davenport apply, because the ancillary question of Hughes, Hubbard's fees has not become moot pending our decision. Even if the case had become moot, we would retain discretion whether to vacate the prior determination on Hughes, Hubbard's claim and the counterclaim. The Supreme Court has said that "in deciding whether to disturb prior judgments in a case rendered nonjusticiable, we have inquired, pivotally, 'whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action." Anderson v. Green, _ U.S. _ (Feb. 22, 1995). Robbs seeks relief from the judgment below, yet Robbs' voluntary action to dismiss his case caused the mootness, if there was mootness at all.